IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN GALANOPOULAS, *et al*,	:	CIVIL ACTION
Plaintiffs	:	
	:	
	:	
v.	:	
	:	
CHARLES W. SMITHGALL, *et al*,	:	
Defendants	:	NO. 02-8362

M E M O R A N D U M

Gene E.K. Pratter, J. January 26, 2005

The Defendants move for summary judgment on the Plaintiffs' Section 1983 claims that the Defendants violated the Plaintiffs' due process and equal protection rights under the Fourteenth Amendment and also violated their First Amendment right to associate.[1] During oral argument, Plaintiffs represented through counsel that they have withdrawn their equal protection and First Amendment claims. Therefore, the Court will not consider these claims and will address only the arguments pertaining to the alleged substantive due process violation.

In their Motion, Defendants primarily argue that there is scant evidence that the actions of

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[1] In the Complaint, the Plaintiffs specifically state:

> This is a civil rights complaint alleging due process violations for the deprivation of property rights, conspiracy to deprive plaintiff[s'] of their property rights, and for the violation of plaintiff[s'] rights under the equal protection clause of the 14th Amendment. Plaintiff[s] additionally alleges violations of their First Amendment rights to associate, do business, and pursue their chosen vocation, and also to enjoy the benefits of the Pennsylvania Constitution. Plaintiff's Complaint ¶ 1.

Since Plaintiffs did not allege any specific violations of the Pennsylvania Constitution, the Court finds that Plaintiffs did not successfully assert any claim under the Pennsylvania Constitution.

Defendant City of Lancaster, or any of the individual Defendants, in shutting down the Fairmount House restaurant and bar and taking two months to issue to Plaintiffs the necessary building permit to make the required repairs "shocks the conscience." Defendants claim that since Plaintiffs have the burden of showing Defendants' actions "shocked the conscience" in order to prove a substantive due process violation in this case, the claim cannot proceed.

In their response, Plaintiffs argue that the totality of the circumstances surrounding the closure of the Fairmount House and the delay in issuing the permit provide evidence of a conspiracy to put Plaintiffs out of business. This alleged conspiracy, according to Plaintiffs, "shocks the conscience" and, therefore, according to Plaintiffs, there is a genuine issue of material fact as to whether the alleged conspiracy occurred.

The Court finds that the record presented does not show behavior extreme and/or outrageous enough to "shock the conscience." Without such evidence there is no substantive due process claim. Therefore, the Motion for Summary Judgment will be granted.

I. FACTUAL BACKGROUND

Because this a motion for summary judgment, the Court views the facts in the light most favorable to Plaintiffs and will make any *reasonable* inferences supported by those facts.

Plaintiff Fairmount House was a bar/restaurant in Lancaster operated by Plaintiffs John Galanopoulas and Konstantinos Tsoutsoulis. Plaintiffs had financed their acquisition of Fairmount House through an installment agreement with Donald Roden entered into on February 2, 1999. Alleging building and health code violations, the City revoked Fairmount House's food license on April 27, 2001. The liquor license was likewise revoked, and Fairmount House necessarily ceased operating. It could not reopen until the violations had been corrected. As part

of these corrections, the Plaintiffs needed to undertake construction that required a building permit. Although Plaintiffs submitted the necessary documents for the permit, it took two months for the City to issue the permit. Because Plaintiffs earned no income from the Fairmount House while the building permit was pending, they claim they could not afford to pay their installments on the loan or the ongoing construction fees. Consequently, when the lender foreclosed, the individual Plaintiffs lost their rights to the premises.

In addition to Lancaster Mayor Charles Smithgall, the other named defendants were various inspectors who investigated Fairmount House at different times and cited it for various violations of health or housing codes. All of these inspectors reported either directly or through a supervisor to Mayor Charles Smithgall.

During discovery, Mayor Smithgall stated that he had a standing "order" for every restaurant to be inspected twice a year. He also testified that prior to the City officials authorizing closure of Fairmount House, his office had received complaints about it from the neighbors. Mayor Smithgall testified that he would generally refer complaints to the appropriate agency to address such issues. However, in this instance, Mayor Smithgall specifically directed members of the police and housing departments to speak with Plaintiffs about the noise, litter, and disruptive behavior.

Beginning in September of 1999, Defendant Janice Harmes performed the regular, unannounced inspections of Fairmount House about every six months. Harmes found various violations, and the Plaintiffs took corrective actions and received "positive responses" from Harmes on her follow-up visits. Harmes was not aware personally of any citizen complaints about Fairmount House. However, in a meeting sometime in January or February of 2001,

Harmes was told by city administrators that the Fairmount House probably should be shut down due to various problems.

On February 12, 2001, Defendant John Dombach, the Lancaster City zoning officer, went to Fairmount House to address the unauthorized construction of a makeshift lean-to garage behind the establishment. Dombach does not recall who informed him of the improper construction. Dombach did not enter the structure; nor did he speak with the Plaintiffs. However, he completed and issued a Notice of Violation and Cease and Desist Order. On this same day, Defendant James Landeck, a building inspector, issued a permit for the removal of the garage. The structure was removed, and Dombach did not return to reinspect the property.

In March or April, 2001, Mayor Smithgall was contacted by the Bureau of Liquor Control Enforcement (BLCE), in connection with BLCE's intention to conduct bar checks in Lancaster on a Saturday night. On April 27, 2001, the BLCE, along with officials from Lancaster City, including Mayor Smithgall, inspected several bars, including the Fairmount House. One of the participating City officials was Defendant Eileen Bauer, who had never participated in these "raids" before, but was asked by Mayor Smithgall to accompany him on this occasion.

During the stop at Fairmount House, BLCE determined that all of the customers possessed identification showing they were above the legal drinking age. After the BLCE checked the patrons, the City officials entered the building. Mayor Smithgall observed several problems, relating to plumbing and electrical issues, a closed fire exit, and dirty conditions. Bauer performed an inspection and found unsanitary conditions and bugs. Therefore, she recommended revocation of the food license. The BLCE informed Mayor Smithgall that if the food license was revoked, the liquor license also needed to be revoked. Plaintiffs disputed the

findings of Mayor Smithgall and Bauer, and refused to sign the inspection forms. The April 27, 2001 inspection form issued to Fairmount House does not specify a reinspection date, as is required.

Without its food or liquor licenses, the Fairmount House was forced to close. Plaintiffs immediately began working on correcting the items listed in the Inspection Report. On May 1, 2001, Bauer returned for a reinspection along with Landeck. Bauer noted that improvements had been made at Fairmount House, but Landeck issued a Stop Work Notice, ostensibly because the Plaintiffs had not obtained a building permit before beginning the repairs. Landeck noted that the construction required new architectural and engineering drawings for the interior changes to Fairmount House. A June 3, 2001 reinspection date was set.

Prior to May 3, 2001, Defendant David A. Rineer, plumbing inspector for Lancaster City, inspected Fairmount House when he was notified that construction was proceeding without a permit. On May 3, 2001, Rineer sent the Plaintiffs an Inspection Report noting that a permit and inspection would be required and that they needed a licensed master plumber to do the work. Such a plumber, Robert Ranck, contacted Rineer and accompanied him to Fairmount House to review the plumbing system.

On May 7, 2001, Landeck received Plaintiffs' architectural drawings and other material for the building permit. Two months later, on July 9, 2001, Landeck issued a building permit for Fairmount House. An inspection of a fire-rated ceiling was also noted as being required. Landeck cannot remember what caused the 60-day time passage for issuing the permit. Mayor Smithgall asserts that the two month period was caused because the Pennsylvania Department of Labor and Industry ("L & I") had not approved the plan. However, the plans that were sent to

Landeck had been approved by L & I prior to being sent to Landeck.

Plaintiffs claim that their architect argued with Landeck that there was no reason why Fairmount House could not be immediately reopened. They also claim that Landeck privately met with the architect and, after this meeting, the architect informed Galanopoulas that the architect had to stay away from the Fairmount House.

After the April 27 raid, Plaintiff Galanopoulas went to Mayor Smithgall's office to discuss the situation. At this meeting, Mayor Smithgall informed Galanopoulas that he knew of a purchaser interested in the Fairmount House property and allegedly asked Galanopoulas if he wanted to be doing business with "those people." When Fairmount House was in business, its clientele was composed primarily of persons from racial minority groups. Galanopoulas refused to sell the property.

On June 11, 2001, a community meeting was held near the Fairmount House property. This meeting was organized by BLCE and City of Lancaster officials to discuss nuisance bars in the neighborhood, including Fairmount House. Plaintiffs were not specifically invited to attend the meeting, bu, there is no evidence that there have been any "invitations" to the meeting, only a public notice of its occurrence. Plaintiffs did learn of the meeting and were allowed to attend and speak during the meeting. However, Plaintiff Galanopoulas was escorted out of the meeting when the police concluded that he was creating a disturbance.

II. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law." FED. R. CIV. P. 56(c). Reviewing the record, the Court is obliged to "resolve all reasonable inferences in [the non-moving party's] favor." Jones v. Sch. Dist. of Phila., 198 F.3d 403, 409 (3d Cir. 1999). The moving parties, here the City of Lancaster and the various Lancaster officials who are defendants, bear the burden of showing that the record reveals no genuine issue as to any material fact and that they are entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Once the moving parties have met this burden, the non-moving parties, here Galanopoulas, Tsoutsoulis, and the Fairmount House, must go beyond the pleadings to set forth specific facts showing that there is a genuine issue for trial. Id. However, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts," and must produce competent evidence supporting their opposition. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

When evaluating a summary judgment motion, the factual disputes must be both material and genuine. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is material if it is predicated upon facts that are relevant and necessary and that may affect the outcome of the matter pursuant to the underlying applicable law. Id. An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Id. at 248-49. However, summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, because such a failure as to an essential element necessarily renders all other facts immaterial. Celetox Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Under such circumstances, there is only one reasonable conclusion regarding the potential verdict under the governing law, and judgment must be awarded to the moving party. Anderson, 477 U.S. at 250.

III. DISCUSSION

As previously discussed, Plaintiffs have withdrawn all claims other than the alleged substantive due process claim. To demonstrate a Section 1983 substantive due process claim, a plaintiff must provide the requisite evidence of a protected property interest. Independent Enterprises. v. Pittsburgh Water, 103 F.3d 1165, 1179-80 (3d Cir. 1997). Ownership of real property or of an enterprise is a "property interest" entitled to substantive due process protection. Id. When municipal executive action interferes with a property interest, substantive due process protection is warranted. Id. A leaseholder has the same property interests as the owner of a property. See Neiderhiser v. Borough of Berwick, 840 F.2d 213, 218 (3d Cir. 1988) (finding violation of due process in zoning dispute where municipality interfered with lessee's enjoyment of property). In this case, the Court finds that Plaintiffs had a property interest in the Fairmount House and this property interest was affected by the actions of the City of Lancaster and the other Defendants.

If a plaintiff establishes a protected property interest, the plaintiff must then demonstrate that the government's actions against that interest "shocked the conscience." County of Sacramento v. Lewis, 523 U.S. 833, 846-47 (1998); United Artists Theatre Circuit v. Township of Warrington, 316 F.3d 392, 400-01 (3d Cir. 2003). The Third Circuit Court of Appeals has noted that "[l]and use decisions are matters of local concern, and such disputes should not be transformed into substantive due process claims based only on allegations that government officials acted with 'improper motives.'" United Artists, 316 F.3d at 402.

The "shocks the conscience" test "varies depending on the factual context." Id. at 400. However, "[w]hat 'shocks the conscience' is only the most egregious official conduct." Id. In

other words, actions that "shock the conscience" must be so offensive and egregious that they offend the sensibilities of the average person. Id.

Plaintiffs cite 18 instances of behavior that combined "shocks the conscience." Defendants refer to these issues as "red herrings." The 18 acts or omissions are: 1) Harmes was told by city administrators that they intended to shut down Plaintiffs' bar;[2] 2) the April 27 raid was unannounced; 3) no Plaintiff signed the April 27 Inspection Report as required; 4) no follow-up inspection date was listed on the Report or disclosed to the Plaintiffs; 5) the follow-up inspection occurred on the Tuesday after the Friday raid, giving Plaintiffs only one business day to make the required repairs; 6) Plaintiffs did not sign the follow-up inspection report; 7) the City issued a stop work order preventing Plaintiffs from making the required repairs; 8) Landeck waited two months to issue the building permit needed to lift the stop work order; 9) it was "made clear" to Plaintiffs' architect that Defendants wanted to shut down the Fairmount House;[3] 10) Mayor Smithgall claimed the two month delay was due to the Pennsylvania Department of Labor and Industry, which Plaintiffs claim was not the case; 11) Mayor Smithgall claimed he was unaware of health code violations at Fairmount House prior to his inspection on April 27, but he requested Bauer to go on the BLCE raid (which was not the normal procedure); 12) City officials held a public meeting about the Fairmount House without notifying Plaintiffs; 13) Galanopoulas was forcibly removed from this meeting; 14) Mayor Smithgall allegedly told Galanopoulas that

[2] Actually, Harmes testified that Mr. Burke (a City official) told her: "Probably just that it should be closed." Harmes Dep. at 29. She did not recall Burke giving reasons for this statement, but she did state "[w]e had sufficient reasons to close them." Harmes Dep. at 29.

[3] The Plaintiffs did not provide any evidence supporting this statement, other than Plaintiffs' own depositions in which they stated only that their architect stopped working on the project after having a private discussion with Landeck.

he should not be doing business with "those" people (Galanopoulas believed that Mayor Smithgall meant African-Americans); 15) Mayor Smithgall encouraged Plaintiffs to abandon Fairmount House by informing them that he knew of a willing and able purchaser; 16) Plaintiffs always took corrective actions after every inspection report; 17) none of the Defendants could explain how they became aware of, or who informed them of, possible violations at Fairmount House; and 18) the BLCE threat that if Plaintiffs tried to reopen Fairmount House they would try to cut the bar into two pieces.[4]

The Plaintiffs argue that all of these facts or events combined demonstrate a pattern of behavior that is inconsistent with proper government management. Furthermore, Plaintiffs claim the delays and Smithgall's actions show that there was a concerted effort to force the Plaintiffs out of business, which "shocks the conscience."

Defendants disagree, claiming no single one or combination of the 18 acts or omissions could meet the "shocks the conscience" test. The Defendants argue here that there is no evidence that the City's decision to cite the Fairmount House "shocks the conscience." Plaintiffs have admitted they were not singled out on April 27, 2001, the inspection date. Furthermore, the Plaintiffs have not provided any evidence disputing that the reasons given for the shut down were untrue. Nor have Plaintiffs shown that the two month period during which Plaintiffs awaited issuance of the building permit was due to anything more than usual bureaucratic procedures, not

[4] Tsoutsoulis claims that on the night of the raid one of the BLCE officers told him that if they tried to reopen the Fairmount House he would "cut the bar into two pieces." Tsoutsoulis Dep. at 35. The BLCE is a state agency, not under the City's control. Even if a plaintiff's own deposition testimony without more could suffice to defeat a summary judgment motion (which it cannot, Schoonejongen v. Curtiss-Wright Corp., 143 F.3d 120, 130-31 (3d Cir. 1998)) the fact that none of the Defendants here could have any control over or liability for the acts of the BLCE would eliminate this allegation as a candidate for an act that "shocks the conscience."

malfeasance. Here, the record includes Galanopoulas's deposition testimony that the reason he was given for the delay was that the permitting officals had "other things ahead of my documents... [a]nd then when my turn comes, they [are] going to examine [the Plaintiffs' permit request]." Galanopoulas Dep. at 102-03. Plaintiffs have not pointed to any other evidence on this point.

Although the Court accepts here the Plaintiffs' argument that it is appropriate to look at the entirety of the record to see if Defendants' behavior "shocks the conscience," the record simply does not support such a finding. Plaintiffs focus heavily on the deficiencies of the City officials, such as the two-month time period in issuing the building permit, the failure to have a follow-up date on the inspection report, not securing one of the Plaintiff's signatures on the inspection report, Plaintiffs were not properly notified of the public meeting, and the lack of information about who informed Defendants of violations at the Fairmount House, but Plaintiffs have failed to show how these alleged deficiencies were more than simply human error or, in the case of the failure to get signatures for the inspection reports, was the result of Tsoutsoulis's own refusal to sign, not the actions of any of the Defendants. Additionally, some of Plaintiffs' "18 points" cannot even be considered to be erroneous: the April 27 raid was unannounced because all of these type of raids are unannounced; the follow-up inspection so soon after the revocation of the food and liquor license would have been viewed as benevolent by the Plaintiffs if the Fairmount House had passed the inspection and the licenses were reinstated so quickly; and the stop work order has not been shown, or even argued, to be improperly issued.

Plaintiffs fail to show any evidence that demonstrates the actions of the inspector Defendants was in any way improper. The only one of the Plaintiffs' "18 points" for which

Defendants have not presented uncontroverted explanations or which is not based exclusively on the testimony of Plaintiffs, is that Defendant Landeck was negligent in taking two months to issue a building permit. Although this delay turned out to be fatal to the Plaintiffs' business in light of Plaintiffs' own financial situation, there is no allegation or evidence that Landeck or any Defendant knew that would be the result of the passage of 60 days. Moreover, two months' time to secure a building permit cannot be said to be so extreme as to "shock the conscience."

Mayor Smithgall's actions are equally not "shocking." Even if the Court were permitted to make the assumption that Mayor Smithgall wanted to put Fairmount House out of business for improper motives (an assumption based entirely on the unfounded accusations and assumptions of Plaintiff Galanopoulas), there is no evidence that Mayor Smithgall in any manner influenced the inspections or encouraged the inspectors to falsify their inspections or any other improper conduct. The only possible evidence that could support that Mayor Smithgall had encouraged officials to find reasons to shut down the Fairmount House is Harmes's statement that a City official had told her they would probably be shutting down the Fairmount House. However, Harmes made it clear that the City had good reasons to shut down the Fairmount House. In fact, Plaintiffs have not even presented any evidence that the reported violations at Fairmount House were false or overstated. An implied improper motive is not enough to "shock the conscience" when the evidence does not show any official conduct that violates the Plaintiffs' rights. There was no "shocking" conduct by any official of the City. Thus, the City of Lancaster cannot be held liable for a substantive due process claim.

Thus, the Court finds that no "genuine issue of material fact" exists to support the Plaintiffs' sole remaining claim, the substantive due process claim. As such, summary judgment

should be granted, and this matter is dismissed.

IV. CONCLUSION

For the foregoing reasons, the Court grants the Defendants' Motion for Summary Judgment. An appropriate Order consistent with this Memorandum follows.

BY THE COURT:

/S/_____
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN GALANOPOULAS, *et al*, Plaintiffs	:	CIVIL ACTION
v.	:	
CHARLES W. SMITHGALL, *et al*, Defendants	:	NO. 02-8362

O R D E R

Gene E.K. Pratter, J. January 26, 2005

AND NOW, this 26th day of January, 2005, upon consideration of the Defendants' Motion for Summary Judgment (Docket No. 20), the Plaintiffs' Brief in Opposition to the Motion (Docket No. 23), the Defendants' Memorandum in Reply to Plaintiffs' Brief (Docket No. 24), and the arguments of counsel made at the oral argument on January 13, 2005, it is hereby ORDERED that the Motion for Summary Judgment is GRANTED and this case is DISMISSED.

It is further ORDERED this matter is CLOSED for statistical purposes.

BY THE COURT:

/S/_____
GENE E. K. PRATTER
UNITED STATES DISTRICT JUDGE